FOR ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-602

DONALD W. AGINS and
BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

On Appeal From
The Supreme Court of California

BRIEF AMICUS CURIAE OF THE COUNTY OF LOS ANGELES IN SUPPORT OF APPELLEE, CITY OF TIBURON

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I

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 42 (4), the Los Angeles County Counsel submits this brief in support of the City of Tiburon.

The County of Los Angeles is the largest local governmental entity in California. The

County is charged with land-use planning and zoning responsibility for an immense and varied area in which inadequate land use planning could prove disastrous to persons and property. This area, approximately a 4,000 square mile region, is twice the size of Israel and contains nearly as many people as the state of New Jersey.

The County of Los Angeles is presently engaged in the immense, legislatively-mandated project of drafting a general plan. This plan is required by law to include an open-space land element; zoning ordinances and other land-use control activities must conform with the open-space element of the general plan. See West's California Government Code, sections 65100, 65101, 65560, 65561, 65562, 65566, 65567 (and Supp. 1980).

The exposure of County resources to judgments for compensatory damages under a theory of inverse condemnation for the taking of private property by zoning activities creates an intolerable situation.

Los Angeles County planners and the local elected officials, the Board of Supervisors, believe that the rights of property owners are adequately safeguarded by the equitable remedies described in the Agins v. City of Tiburon decision, without subjecting the County to potentially disastrous and uncertain damage awards for inverse condemnation resulting from the entity's zoning or land-use planning activities.

Zoning disputes are frequently portrayed as a struggle between the zoning agency and the large developer of property. These disputes do exist.

However, there are also many zoning cases which involve the owners of small parcels of land which have previously been developed and the developer of raw land. The small landowners' holdings usually consist of their primary economic investment, their homes, which they feel are being potentially threatened by the developer's proposal. They fear any intense development or change in use which may negatively affect either their way of life, by more traffic, pollution, and congestion, or their financial investment.

Developers, on the other hand, often desire a zoning or use designation allowing them to maximize their construction on a given quantity of property in order to decrease the unit costs of construction and to increase the resultant profitability of the project.

The public entity has interests of its own in determining and setting the types and intensities of use of the property within its jurisdiction. In California, a public entity is mandated to designate certain broad ranges of uses by planning and zoning. West's California Government Code (Supp. 1980), section 65302. In addition, it is obligated to protect its citizenry from natural hazards, whether they be fires, landslides, flooding or other forms of disaster. The entity has an interest in not allowing excessive density and in providing various types of uses permitting different types of development for society.

It has an interest in not allowing random or extended development in remote or distant areas because each new development necessitates

expenditures of public funds for streets, sewers, street lighting, schools, hospitals, parks, and police and fire protection.

An area like Los Angeles County, with its 4,000 square miles of land consisting of desert, mountains, watercourses, seacoast, and coastal plain, demonstrates the enormous need for land-use community planning.

Mixed into each zoning dispute of any significance are the conflicting social interests of environmental protection and safety, jobs in the construction industry, housing needs, and the property tax base.

It is in this context that local planning officials must make their decisions on the uses of property within the jurisdiction. Obviously, studies must be made by the planners and by the various interested parties. Public hearings must be held to allow the expression of views and opinions to the planning board.

Yet, at some point a decision must be made by the planning agency.

We respectfully submit that a public entity should not be required to face the potential payment of compensatory damages resulting from its good faith exercise of the planning and zoning power. Rather, we contend that the decision of the California Supreme Court in the case of Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), which requires a property owner to test the constitutionality of a zoning ordinance by an equitable action rather than by an action for

compensatory damages, adequately protects the rights of property owners under the taking clause of the Fifth Amendment.

II

FACTS AND HOLDING IN AGINS V. TIBURON

Agins v. Tiburon is reported at 24 Cal. 3d 266, 157 Cal. Rptr. 372.

Because this case has generated an unusual amount of public controversy for a zoning case, it is important to carefully set forth the salient facts pleaded (and not pleaded) by the property owners and to state concisely the holding by the California Supreme Court.

A. Salient Facts Alleged In the Complaint, Not Alleged, Or Subject to Judicial Notice

(1) The subject property is five acres of undeveloped land of a scenic nature. Joint Appendix (hereinafter "J.A."), page 4, para. III.

(2) The City of Tiburon contemplated acquisition of the subject property for open space purposes, filed an eminent domain action to acquire the subject property on December 4, 1974, and ultimately dismissed the action, after filing a notice of abandonment, on February 5, 1975.

J.A. 5-10.

(3) A zoning ordinance of the City of Tiburon, No. 124 N.S., which was expressly incorporated by reference in the complaint, J.A. 5, para. IV, effective June 28, 1973, would on its face allow a maximum of five single-family dwellings or a minimum of one, depending on the design and an environmental impact report. Agins v. Tiburon, 24 Cal.3d 266, 271, 157 Cal. Rptr. 372, 374 (1979). The ordinance on its face would allow residential development, for which the appellants purchased the property and which they allege is its highest and best use. J.A. 4, para. III.

(4) The complaint does not allege the intensity of use intended by the appellants.

(5) There is no allegation as to what the zoning was on the subject property before the effective date of No. 124 N.S. or what type or density of development might have been permitted under the prior ordinance.

(6) There is no allegation that the appellants have ever applied to use or improve their property or that they have sought a definitive statement as to how many dwelling units they would be allowed to build. Agins v. Tiburon, 24 Cal.3d 266, 271, 157 Cal.Rptr. 372, 374 (1979).

(7) There is no allegation that appellants have ever requested from the proper zoning authorities a variance, a conditional use permit, or a change of zone to allow greater density in the

development of their property than that allowed on the face of the ordinance.

(8) The City of Tiburon, and all cities and counties of California, are required by California law to prepare a general plan for use of land within their jurisdiction which includes the general location and extent of land for housing, business, industry, and open space. West's California Government Code (and Supp. 1980), §§65302 subd. (a), 65561, 65562, 65563, 65567, 65860. Zoning ordinances must be consistent with the local entity's general plan. Id., §§65567, 65860.

(9) The California Legislature's definition of "open space" does not include residential development in any form. West's California Government Code (Supp. 1980), §65560 subd. (b)(1) through (4). A mixture of open space and residential planned development is not prohibited.

(10) The regulation of lot-sizes and density of single-family residences per acre is a very common and very old purpose of zoning ordinances for single-family residential development. See Simon v. Town of Needham, 311 Mass. 560, 42 N.E. 2d 516, 141 A.L.R. 688 (1942). A minimum lot size of one single-family residence for five acres would not be unusual. See e.g., Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952); Honeck v. County of Cook, 12 Ill.2d 257, 146 N.E.2d 35 (1957).

(11) There is no allegation by appellants that they intended to make a more intense use of the land than the least intense use allowed on the

face of the challenged ordinance. Therefore, it is doubtful that they have satisfied the "case or controversy" requirement (or the "standing" requirement) to challenge the ordinance for failure to allow intense enough development of their property. Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 252, 261-63 (1977) (Developer has standing, and there is a case or controversy, to challenge a zoning action on 14th Amendment grounds, when it planned and intended to make a specific use of the subject parcel which was unconstitutionally prohibited by the zoning authority).

(12) Appellants allege that they have been damaged to the extent of the full fair-market value of the property, two million dollars, J.A. page 7, para. X.

B. The Holding In Agins v. City Of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979)

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(1) The holding of the case is expressly limited to a zoning ordinance. Id., 24 Cal. 3d at 269.

Under California law and the common law of the United States, zoning is a power of municipal corporations to divide the municipality into various land-use districts. The Standard State Zoning Enabling Act, produced by the United States Department of Commerce in 1926, upon which most state acts are based, describes zoning as follows:

"For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings . . . the percentage of lot that may be occupied, the size of yards . . . the density of population and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. . . . For any and all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act. . . ." Reprinted in Urban Planning and Land Development Control Law, by Donald G. Hagman (West Publishing Co., Hornbook Series, St. Paul, Minn., 1971) at 80.

Zoning is only one type of exercise of the police power by local government, a highly specialized and traditional governmental activity with extensive case law. There is no reason to presume that this holding will be applied to other kinds of governmental entities or other police powers exercised by government.

(2) Inverse condemnation action for compensatory damages will not lie when the alleged governmental taking without just compensation is caused by municipal zoning ordinance or exercise of the municipal zoning power. Based on policy considerations, the proper remedies are equitable,

including declaratory relief and mandate to declare the ordinance unconstitutional and void as violative of the taking clause or to compel the granting of building permits and subdivision approvals when unconstitutionally denied. Agins v. Tiburon, supra, 24 Cal. 3d at 275-277.

(3) A municipal zoning ordinance will be unconstitutional under the taking clause of the Fifth Amendment and subject to invalidation when the effect is to deprive the owner of substantially all reasonable use of his land. Id., supra, at 277.

This is the Holmes test for a taking, adopted by the majority in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), not the Brandeis test of the dissent in that case.

(4) When the property owner does not allege with specificity how an ordinance has been applied to his property, or that it has in fact been applied to his property by the municipal government so as to unconstitutionally deprive plaintiff of all reasonable use of the land, the court will disregard an allegation of "taking as applied" as conclusionary, on demurrer, and look to the face of the zoning ordinance to see if reasonable uses are allowed. Agins v. Tiburon, supra, 24 Cal. 3d at 277.

(5) The court also held that the "pre-condemnation activity" pleaded, which included the authorization of studies recommending the acquisition of the property for open-space purposes and the issuance of bonds for that purpose, and

the filing and abandonment of the eminent domain proceeding, did not state a cause of action for inverse condemnation damages under California law. Agins v. Tiburon, supra, 24 Cal. 3d at 277-78, citing Klopping v. City of Whittier, 8 Cal. 3d 39, 104 Cal. Rptr. 1 (1972).

The Agins court did not overturn Klopping. They merely held that the facts pleaded do not fall within the inverse cause of action described in Klopping.

There is ample California authority to support this holding of the Agins court. See West's California Code of Civil Procedure (Supp. 1980), sections 1268.510, 1268.610; see also Selby v. San Beunaventura, 10 Cal. 3d 110, 120-21, 109 Cal. Rptr. 799 (1973). Accordingly, this part of the holding is not unreasonable or arbitrary.

Even if there were an erroneous application of state law, adequate in itself to protect constitutional rights, no issue would be raised for this court under the due process clause of the Fourteenth Amendment, unless the ruling were totally arbitrary or capricious. American Ry. Express v. Kentucky, 273 U.S. 269, 272-73 (1926); Watson v. Kenlick Coal Co., Inc., 498 F.2d 1183, 1187-89 (1974).

Therefore, since Agins does not purport to eliminate the action for inverse damages for pre-condemnation activities in California, but merely interprets California law, holdingthat no such cause of action is stated by the facts of the case, there is no Fourteenth Amendment issue before this court as to that part of the Agins holding.

III

THE FOURTEENTH AMENDMENT ALLOWS THE CALIFORNIA SUPREME COURT TO LIMIT PROPERTY OWNERS TO EQUITABLE RELIEF IN THIS CASE.

The acts and decisions of the California Supreme Court are "state action" and the taking clause of Fifth Amendment applies to the states through the due process clause of the Fourteenth Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1963); Chicago, B. and Q. Ry. Co. v. Chicago, 166 U.S. 226, 234-41 (1897).

The settled rule in Fourteenth Amendment questions is that state judicial action need not provide specific legal means of vindicating constitutional rights as long as the remedy provided is adequate. A state's judiciary may even substantially change the means of vindicating the rights as long as an adequate remedy is substituted.

A state is not required by the Fourteenth Amendment to permit a damage action, or any specific form of action for the vindication of constitutionally protected rights as long as the available remedy is adequate to protect rights guaranteed by the Constitution. Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 159-60 (1931); Iowa Central Ry. Co. v. State of Iowa, 160 U.S. 389, 393 (1896); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1902).

This principle applies to the appellate courts of a state as well as to the state legislature. American Railway Express v. Kentucky, 273 U.S. 269, 274 (1927).

The federal constitutional question under the Fourteenth Amendment in the case at bar is whether the state remedy described in Agins is adequate to vindicate and protect property rights under the taking clause.

First, as argued infra, the California Supreme Court has carefully followed this Court as to the taking rule. It does not purport to lessen the force of the taking doctrine but to specify the proper remedy if an unconstitutional zoning activity were to occur.

It does not hold that henceforth property may be taken by zoning without just compensation.

It holds that the mandatory nature of the words "nor shall private property be taken for public use without just compensation" will be given full effect, in that no zoning ordinance may be both a valid exercise of the police power and a taking in violation of the Fifth Amendment. If it violates the taking clause it is void, not an informal exercise of the power of eminent domain.

The California court holds that a property owner faced with a zoning ordinance which is unconstitutional on its face or as applied, should obtain an invalidation or should compel by mandate a variance, map approval, or permit.

It is important to remember that the California Supreme Court has never held that zoning activities, which constitute a taking of property without just compensation, give rise to a cause of action for money damages under a theory of inverse condemnation. In H. F. H., Ltd. v. Superior Court, 15 Cal. 3d 508, 518 note 16, 125 Cal. Rptr. 365 (1975), the court expressly refused to rule on the question.

California courts have never allowed money damages on an inverse condemnation theory in a true zoning case except for Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), an intermediate-level appellate decision, which was expressly overruled on this point by the California Supreme Court in Agins v. Tiburon, supra, 23 Cal. 3d 266, 273.[1]

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[1] All earlier zoning/taking cases, in which damages for inverse condemnation were allowed involved factual situations distinctly different and easily distinguishable from the facts pleaded in Eldridge or Agins. See extensive analysis of all early zoning/taking/inverse cases in California, H. F. H., Ltd. v. Superior Court, supra, 15 Cal. 3d at 513-18 and notes 4 through 14. It can be strongly argued that Eldridge is based on serious misinterpretation of the very cases discussed by the H. F. H., Ltd. court. See Hall, Eldridge v. City of Palo Alto; Aberration or New Direction in Land Use Law?, 28 Hastings L. J. 1569, 1584-91 (1977). Many California cases in the inverse area are confusing because the California Constitution prohibits damaging of property without compensation as well as taking, an issue not raised by the taking clause of the Fifth Amendment. See West's California Constitution (Supp. 1980), Article 1, section 19.

It is also very important to note that the United States Supreme Court has often upheld the rights of property owners to be free from uncompensated takings by the police power and yet have never upheld or required the award of damages under a theory of inverse condemnation in a zoning or a land-use regulation case.

IV

EQUITABLE RELIEF IS ADEQUATE UNDER CALIFORNIA LAW TO PROTECT LANDOWNERS' PROPERTY RIGHTS IF A LOCAL ZONING ORDINANCE WOULD CONSTITUTE A TAKING

The California court has not changed the test for when zoning becomes taking. This will be discussed below.

It has said that if a local zoning ordinance (on its face or as applied) would constitute a non-compensated taking, under the applicable tests, it is void; the property owner's property rights are vindicated by a declaration of voidness and/or by mandate. Agins v. Tiburon, supra, at 273; see also MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 326 (1960).

Obviously, the greatest protection of rights available to the property owner, which is described in Agins, is that a zoning ordinance which violates the taking clause is subject to invalidation. No valid

zoning ordinance can also be an uncompensated taking. Eldridge v. Palo Alto, 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575 (1976), which held otherwise was expressly overruled in Agins. Agins v. Tiburon, supra, at 273.

In practical terms, the equitable enforcement and protection of the constitutional right to be free of zoning which violates the taking clause is an effective remedy under our state law and procedure for the following reasons:

1. Priority of Trial Setting and Speedy Resolution: The action for declaratory relief is specifically entitled to priority in setting for trial. West's California Code of Civil Procedure, §1062a. Mandamus, either administrative or traditional, West's California Code of Civil Procedure, §§1084 to 1094.5, 1107-08, is a special proceeding and trial may be had and the writ issued or denied very quickly. The alternative writ, which must issue within five days, includes the date for the hearing on the merits. West's California Code of Civil Procedure, §§1088, 1107.

2. The action for declaratory relief is well-established in California as a means to void a zoning ordinance which is unconstitutional or unconstitutional as applied. Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 216, 93 Pac. 2d 93 (1939).

3. The traditional writ of mandate is long-established in California as a means of challenging unconstitutional zoning and zoning actions. Roman Catholic Welfare Corp. v. Piedmont, 45 Cal. 2d 325, 334, 289 Pac. 2d 438 (1955); Reynolds v. Barrett, 12 Cal. 2d 244, 249-52, 83 Pac. 2d 29 (1938);

Floresta, Inc. v. San Leandro, 190 Cal. App. 2d 599, 612, 12 Cal. Rptr. 182 (1961).

4. Administrative mandate is also an effective remedy. If the challenged ordinance provides for administrative hearing and appeals, as most do, then traditional or ordinary mandamus is not the proper remedy; rather, the proper remedy is administrative mandate. West's California Code of Civil Procedure, §1094.5; see also Selby v. San Buenaventura, 10 Cal. 3d 110, 128, 109 Cal. Rptr. 799 (1973).

5. The enforcement of an unconstitutional zoning ordinance may be enjoined. MacLeod v. Los Altos, 182 Cal. App. 2d 364, 369-70, 6 Cal. Rptr. 326 (1960); McCaslin v. Monterey Park, 163 Cal. App. 2d 339, 346-48, 329 Pac. 2d 522 (1958).

Also, the following strong public policy reasons support the California Supreme Court's decision limiting property owners to equitable relief in this type of zoning case:

(1) Damage awards under a theory of inverse condemnation would chill the crucial planning process because of the threat of a judicial finding of an unintended taking.

(2) The power of eminent domain should only be exercised intentionally by local government and in accordance with the very strict procedural requirements expressly mandated by the California Legislature in the Eminent Domain Law because the exercise of the power of eminent domain always involves the expenditure of public funds and the taking

of private property.

The strict procedural requirements of the Eminent Domain Law are obviously designed to provide the public an opportunity for debate about the nature of the project (and its approximate cost) and to give the property owner an opportunity to object. See West's California Code of Civil Procedure (Supp. 1980), §§1245.220 (governing body must adopt a resolution of necessity), 1245.230 (resolution must describe the property so that it can be identified and the public project for which it is necessary), 1245.235 (the public hearing must be noticed to all property owners), 1245.240 (two-thirds vote of governing body necessary for adopting the resolution).

The restrictions and safeguards of the Eminent Domain Law would be totally negated if the judiciary could determine, after the fact, not only that a legislative act, zoning, constituted a taking without compensation, but that it also constituted an exercise of the power of eminent domain. There would be no chance at all for public debate on whether the proposed public use was worth the likely cost or worth the public and private inconvenience.

This judicial usurpation of the legislative power of eminent domain, by ordering compensation for an unintended taking by zoning, raises very serious separation-of-powers problems.

This Court has previously held that the judicial branch should show restraint where the legislative power of eminent domain is involved.

See Berman v. Parker, 348 U.S. 26, 32, 33 (1954) (Exercise of the power of eminent domain is not within the province of the judicial branch).

V

THE AGINS TEST FOR WHEN AN UNCOMPENSATED TAKING WOULD OCCUR BY A LOCAL ZONING ORDINANCE IS EXACTLY THE TEST ENUNCIATED BY THIS COURT

It is very clear from the opinion that the California Supreme Court in Agins has adopted the rule of Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), as opposed to the rule favored by Justice Brandeis. The disagreement between the majority and dissenting opinions in that case is a very important one and reflects an academic controversy that is still very much alive.

This Court has recently reaffirmed the Holmes test in Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 127-28 (1978).

In Pennsylvania Coal Justice Holmes wrote for the majority that, although the challenged regulation, which outlawed the mining of coal supporting developed urban land was unquestionably for a valid and very important public purpose, it was unconstitutional as an uncompensated taking for public use because the regulation ended the only reasonable use which the owner of the subjacent

coal could make of his property and because the statute did not provide for compensation.

An important dissent by Justice Brandeis in that opinion states a very different rule.

Justice Brandeis' dissent states that even though all use of the owner's property was destroyed by the statute, the statute cannot constitute a taking since the statute was to protect the public and since the prevention of removal of support for urban land did just that.

He relied on cases holding that state statutes which outlawed the manufacture of oleomargerine and the distilling of liquor were not uncompensated takings of properties which had no other reasonable use than the manufacture of oleomargerine and the distillation of liquor. Powell v. Pennsylvania, 127 U.S. 678, 682 (1888); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

This conflict about the proper interpretation of the taking clause, in cases which only involve regulation of use of land rather than physical invasion or public appropriation, is still vehemently with us.

But, in any event, the majority opinion in Pennsylvania Coal, which strongly protects property rights, is the law and the California Supreme Court has expressly adopted the Holmes test. It does not hold that the unquestionable public benefit from minimum lot-size zoning or from zoning which regulates the density of residential use of scenic land is the test of a taking by zoning.

They clearly hold that the test is, even though the social purpose and function of the zoning may be unquestioned, whether the owner has any reasonable use of his land. Agins v. Tiburon, supra, 24 Cal. 3d at 277.

VI

IF REASONABLE USE OF THE PROPERTY IS ALLOWED ON THE FACE OF THE ORDINANCE, NO TRIAL ON THE MERITS IS WARRANTED WHEN OWNERS HAVE NOT PURSUED ANY ADMINISTRATIVE REMEDIES.

The challenged ordinance on its face could allow a maximum of five dwelling units on the Agins' five acres or a minimum of one dwelling unit. Agins v. Tiburon, supra, 24 Cal. 3d at 271.

The Agins do not plead that they made an application for a building permit, for tentative subdivision approval, for a variance, or for a change of zone. Id., at 271. Nor have they even asked for a definite statement as to how many dwelling units they could build. Id.

The trial court ruled on demurrer that there had been no taking because on the face of the ordinance, incorporated by reference in the complaint, there was a reasonable use of the subject five acres of residential property, one to five residences.

The Agins now contend that because the court disregarded their purely conclusionary allegation that the zoning ordinance as applied gave them no reasonable use, they have been unfairly denied a trial.

Under the law of California, a fact-pleading jurisdiction, a court may disregard conclusionary allegations, or allegations which are a sham, on demurrer. West's California Code of Civil Procedure, §425.10(a); Semole v. Sansoucie, 28 Cal. App. 3d 714, 717-19, 104 Cal. Rptr. 897 (1972); Neal v. Bank of America, 93 Cal. App. 2d 678, 682-83, 209 Pac. 2d 825 (1949); see also Hecton v. Dept. of Transportation, 58 Cal. App. 3d 653, 657, 130 Cal. Rptr. 230 (1976).

Since appellants have never made any application to use the property or to obtain a variance or even a change of zone, the ordinance has never been applied to their property by the zoning officials of the City of Tiburon.

It is a good rule that one should not be able to challenge a zoning ordinance as applied until he has administratively sought some relief, created an evidentiary record of the engineering or economic or construction problems, received a ruling on the specific request, conducted an administrative appeal, and allowed the zoning entity to closely examine the proper application of the ordinance to his property.

Assuming that a variance or a change of zone is in fact necessary for the Agins property to be developed economically, can the city be

expected to grant relief from a zoning ordinance which the injured property owner has not requested? The local zoning officials have no reason to know that the Agins are aggrieved except for this lawsuit. The "as applied" issue herein would require the Supreme Court of Marin County to sit, ab initio and with no prior pursuit of administrative relief, as a local zoning appeals board for the tiny City of Tiburon.

A specific zoning for many California counties could extend for hundreds of square miles. In such large areas it is possible that some individual parcels could be improperly zoned. In order to prevent chaos in the courts and to uphold the local zoning power, owners should be required to seek some administrative relief prior to seeking judicial intervention.

In reality the Agins are saying that the ordinance is unconstitutional as it might be applied to their property.

California law requires that a land owner pursue administrative remedies in zoning cases before seeking judicial relief and the failure to so plead is grounds for general demurrer. Igna v. City of Baldwin Park, 9 Cal. App. 3d 909, 914, 88 Cal. Rptr. 581 (1970).

This is a good requirement under the separation-of-powers doctrine and for judicial economy.

VII

NO VESTED PROPERTY RIGHT IN EXISTING ZONING OF UNDEVELOPED LAND.

In the subject complaint there is no allegation as to what the zoning was on the property before the challenged ordinance was enacted, so it is not clear whether or not this case involves a "down-zoning" of raw land.

If this is the case, it is a well-established rule of American property law that a landowner has no vested right in existing zoning of a parcel of land until he obtains a building permit and substantially starts construction. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386 (1976) (Cert. Den. 429 U. S. 1083, 51 L. Ed. 2d 529); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal. App. 2d 776, 782-98, 194 Pac. 2d 148 (1948).

From this principle it follows that substantial diminution in value because of down-zoning is not a taking under the Fifth Amendment. Penn. Central Transp. Co. v. New York City, 438 U. S. 104, 131 (1978).

The market value of land attributable to non-vested existing zoning or anticipated zoning is not a reasonable "distinct investment-backed expectation," as that phrase is used by this Court in the Penn Central case, Id. at 124, for just this reason.

A reasonably prudent buyer of raw land usually pays a price based on an intended use; and he makes the transaction contingent on the vesting of the right to make such use of the property by means of the escrow instructions or an option. If he does not, he is either paying a lower price which reflects the uncertainty of his intended use, or he is making a big mistake.

Any alleged market value of land which is based on non-vested zoning is highly speculative because the "value" is based on the hope that the use will be allowed when there is no vested right to make that use of the property.

The taking clause reads "nor shall private property be taken for public use without just compensation." Under the Trans-Oceanic Oil and Avco cases there is no vested property right to existing zoning until a building permit has been granted and detrimentally relied on. There is no reasonable or prudent "investment backed expectation" until vesting and no "property" which can be taken.

Thus, mere down zoning, when there has been no vesting, cannot constitute a taking.

VIII

CONCLUSION

It is clear that the Fourteenth Amendment does not require of state courts any specific form

of legal vindication of constitutional rights as long as the rights are adequately protected.

The appellants' contention that in the event of judicial invalidation, California local governments will conspire to frustrate the equity power of the California judicial branch by playing vindictive games with property owners presumes malice on the part of local government and weakness of the judiciary. Neither presumption is valid.

The equity power is a strong one and this court should wait and see how it is used by the trial courts of California in light of the Agins decision. The California courts will effectively protect property owners from unconstitutional use of the zoning power.

Furey v. Sacramento, 24 Cal. 3d 862, 157 Cal. Rptr. 684 (1979) (Cert. Den. ___ U.S. ___), is an example of how the California Supreme Court is applying the principles of the Agins decision. In that case a landowner's undeveloped property was zoned "agricultural open space." He had earlier been specially assessed for sewers which were appropriate to a more intense use. The court ruled that the zoning would be unconstitutional as to him and equitable relief should lie, unless he was reimbursed for the substantial contribution as he had made to the special sewer assessment district and reassessed.

Equity provides ample protection for property rights in zoning disputes and is the best remedy from a public policy view point.

This court is urged to affirm the decision in Agins.

Respectfully submitted,

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